

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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Case No. 2:15-cv-00833-RFB-PAL

THE ESTATE OF MARILYN
BURGARD, et al.,

Plaintiffs,

v.

BANK OF AMERICA, N.A. et al.,

Defendants.

ORDER

I. INTRODUCTION

Before the Court are Defendants Bank of America (“BANA”) and Aetna Life Insurance’s (“Aetna”) Motion for Summary Judgment, ECF No. 47, Plaintiffs’ Objection to Discovery Order, ECF No. 53, and Plaintiffs’ Motion for Leave to File Supplement. ECF No. 62. For the reasons stated below, ECF No. 47 Motion for Summary Judgment is granted in part and denied in part; ECF no. 53 Objections to Discovery Order is denied, and ECF No. 62 Motion for Leave to File Supplement is granted.

II. BACKGROUND

On May 4, 2015, Defendant removed this action from the Eighth Judicial District Court. ECF No. 1. On May 11, 2015, Defendant filed a motion to dismiss for failure to state a claim. ECF No. 4. On February 17, 2015, this Court denied Defendants motions to dismiss as to claims 1, 2, 3; but granted it as to claims 4 and 5 without prejudice. ECF No. 25. The Court denied without

1 prejudice as to state law claims and granted without prejudice as to Plaintiff's claim for punitive
2 and exemplary damages. On March 15, 2015, Plaintiff filed a second amended complaint. ECF
3 No. 28. The Second Amended Complaint asserts four counts: (1) Breach of Contract, (2) Breach of
4 the Implied Covenant of Good Faith and Fair Dealing, (3) Violation of the Nevada Unfair Practices
5 Act (NRS 686A.310), and (4) ERISA (29 USC § 1132 and § 502(a)).

6 A scheduling order was entered on March 28, 2016, which provided a discovery cutoff date
7 of August 23, 2016. ECF No. 31. The order stated the following as to dispositive motions: "Filing
8 Date for Dispositive Motions: Thirty (30) days after the close of discovery, which is September
9 22, 2016; However, the Court previously ruled that Defendants can file and the Court will consider
10 an earlier summary judgment motion regarding whether ERISA is applicable to this case (see ECF
11 25)."

12 On August 4, 2016, Defendants filed a Motion for a Protective order. ECF No. 39. Plaintiff
13 did not conduct written discovery. The Motion sought to limit deposition testimony of various
14 individuals allegedly possessing knowledge as to Burgard's life insurance policy. On August 26,
15 2016, Defendant filed a motion for summary judgment. ECF No. 47. On September 9, 2016, Judge
16 Foley granted the Motion for a Protective Order in part and denied in part, permitting one 30(b)(6)
17 deposition of a representative of BANA who "should be prepared to testify about relevant
18 information or documents in the possession of both BANA and Aetna." The order permitted
19 testimony to cover (1) "the fate of the life insurance policy provided to Ms. Burgard at the time of
20 her retirement in 1986, (2) what records may exist pertaining to cancellation of life insurance
21 policies provided to retired employees by predecessor employers or plans; (3) the process by which
22 retired employees were able to convert to life insurance policies in which they pay premiums; and
23 (4) what records may still exist regarding the termination of Burgard's plan and if she was afforded
24 an opportunity to continue life insurance coverage. On September 23, 2016, Plaintiff filed
25 Objections to Judge Foley's order. ECF No. 53. On December 13, 2016, Defendants filed a Motion
26 for Leave to File a Supplement to ECF No. 47 MSJ. The supplement incorporates the testimony
27 permitted by Judge Foley in the order on September 9, 2016, after the original Motion for Summary
28 Judgment had been filed.

1 **III. MOTION FOR LEAVE TO FILE SUPPLEMENT. ECF No. 63.**

2 A scheduling order was entered on March 28, 2016, which provided a discovery cutoff date
3 of August 23, 2016. ECF No. 31. The order stated the following as to dispositive motions: “Filing
4 Date for Dispositive Motions: Thirty (30) days after the close of discovery, which is September
5 22, 2016; However, the Court previously ruled that Defendants can file and the Court will consider
6 an earlier summary judgment motion regarding whether ERISA is applicable to this case. On
7 August 4, 2016, Defendants filed a Motion for a Protective order. ECF No. 39. The Defendants
8 filed their Motion for Summary Judgment on August 26, 2016. ECF No. 47.

9 Subsequent to that filing, the parties litigated the Motion for a Protective Order, and Judge
10 Foley narrowed the scope of discovery in his order issued September 9, 2016. The deposition
11 permitted in that order, of Patricia Parker, BANA’s Global Human Resources Services Delivery
12 Manager and 30(b)(6) corporate designee, occurred on November 16, 2016. To prepare for the
13 deposition testimony, Parker “researched available historical databases and reached out to prior
14 vendors to ensure that she could fully and completely testify as to the deposition topics.” The
15 Defendants filed the Motion for Leave to File the Supplement on December 13, 2016. ECF No.
16 62. After extensions of time were granted, Plaintiff Responded to both the Motion for Summary
17 Judgment and the Supplement on February 2, 2017. ECF No. 70.

18 The record shows that Plaintiff filed an early Motion for Summary Judgment, as
19 specifically suggested by the Court, while they were litigating a discovery dispute. Pursuant to the
20 decision on that dispute, additional discovery occurred in the form of the deposition of Parker.
21 Plaintiffs were permitted ample time to Respond to the Motion for Summary Judgment and the
22 Supplement. Therefore, the Motion reflects good-faith compliance with the orders and
23 recommendations of the magistrate and the Court, and did not prejudice the Plaintiff. ECF No. 62
24 Motion for Leave to File is GRANTED, and the Court considers this motion in conjunction with
25 the Motion for Summary judgment.

26 **IV. LEGAL STANDARD**

27 **A. Motion for Summary Judgment**

28 Summary judgment is appropriate when the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering the propriety of summary judgment, the court views all facts and draws all inferences in the light most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir. 2014). If the movant has carried its burden, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation marks omitted).

V. UNDISPUTED FACTS

A. The “Fate” of Burgard’s Life Insurance Plan

The Court finds the following facts to be undisputed: On or about April 7, 2012, Marilyn Burgard was killed in a car accident. In 1986, Ms. Burgard received a \$10,000 life insurance benefit from her employer Arizona Bank at the time of her retirement. Patricia Parker discovered 1990 and 1992 benefit enrollment records which confirm that Ms. Burgard had life insurance coverage during this time period through Security Pacific. The enrollment records from 1990 and 1992 preceded Bank of America and Aetna’s administration of Ms. Burgard’s benefits. The 1990 document identified by Ms. Parker as the “original enrollment” showed enrolled benefits for Ms. Burgard, including medical coverage, dental coverage, retiree life insurance, accidental death, and benefit dollars. The critical information in this document establishes that in 1990 Ms. Burgard had \$10,000 in life insurance coverage, with a premium of \$10.90.

Arizona Bank was acquired by Security Bank around the time of Burgard’s retirement and she was subsequently treated as a Security Bank retiree. Security Bank was then acquired by Bank of America. Prior to Aetna and Bank of America becoming partners in January 1, 2009, there were other carriers offering insurance coverage to retirees. In 2009, several years after BANA’s acquisition of Security Bank, BANA partnered with Aetna, and its Retiree Life Insurance Plan

1 became effective. The Summary Plan Description (“SPD”) states that “participants and
2 beneficiaries have no vested rights in the BANA Group Benefits Program, any retiree component
3 plan or any program or policy; in particular, no vested rights arise in benefits currently made
4 available to retirees after employment ends or to current contributions required to be paid by
5 retirees.”

6 The benefit enrollment offered by Security Pacific provided options for waiving life
7 insurance coverage in exchange for benefit dollars. For example, Ms. Burgard received \$196.52
8 per month in Benefit Dollars, \$185.62 for “medical dollars” to be used toward her medical benefit,
9 and \$10.90 of “life dollars” related to her life insurance benefit. If she waived these benefits, these
10 amounts would go into her Health Care Savings Fund. Burgard continued her medical and dental
11 coverage, waived vision coverage, and maintained life insurance benefits in the amount of
12 \$10,000, with a premium of \$10.90, and a separate AD&D [Accidental Death and
13 Dismemberment] policy of \$10,000.

14 Historical records provided by Security Pacific BANA included a Security Pacific
15 newsletter, “The Benefits Newsletter for Retirees” where an article was issued in October 1992,
16 “What’s New for 1993.” The article described how retirees could lower or waive their life
17 insurance coverage and apply those benefits to other covered premiums. Once the insured lowered
18 or waived their coverage, the lower coverage would then become the maximum available to them,
19 and once waived the insured could not re-enroll in that benefit. The article further addressed the
20 healthcare savings fund and the use of “Benefit Dollars.” “Benefit Dollars” were payments made
21 by the former employer and were provided to the retirees to purchase life insurance. The article
22 explained, “if you choose coverage lower than you have currently, the excess Benefit Dollars can
23 be used to pay for Dental or Vision coverage, or they can be deposited into your Health Care
24 Savings Fund.” The Health Care Savings Fund is used by the retirees to pay eligible health care
25 expenses not covered by the retirees’ medical plans or Medicare. After 1992 there are no records
26 establishing that Ms. Burgard continued to elect life insurance coverage of \$10,000, with a
27 premium of \$10.90. The records do identify Ms. Burgard applying her “Benefit Dollars” to her
28 HCSF contribution. There is a gap from 1992 to 2001 for which Defendants have no records related

1 to Ms. Burgard.

2 In 1998, Bank of America issued its Plan documents for Retirees where it specifically
3 stated that when a retiree waived his or her life insurance, then it was a permanent election. While
4 some records are missing, BANA did find benefit records for Ms. Burgard between August 2001
5 and December 2013. From 2001 to 2003 the third party administrator for Bank of America was
6 AON Hewett ("AON"). Aetna did not become the insurer of Bank of America until 2009. The
7 records from AON identify the Plan's identification codes that are set forth in the benefit
8 spreadsheet. The critical codes are the Inactive Plan Codes which are designated for retirees. The
9 critical codes are "7900" (Retiree Life Insurance – West), "7050" (Health Care Saving Fund),
10 "2000" (Retiree Medical), "3050" (Retiree Dental), and "3450" (AD&D). AON's records do not
11 show that Ms. Burgard had a life insurance coverage benefit on August 1, 2001. They do show
12 that she was receiving "Flex/Benefit Dollars" that were being paid into her Health Care Saving
13 Account in the amount of \$130.80. Defendants found no records of Ms. Burgard having life
14 insurance coverage after 2001.

15 Fidelity was the third party administrator for Bank of America's Plan from 2006 to June
16 30, 2011. Ms. Parker retrieved from Fidelity a spreadsheet reflecting Ms. Burgard's benefits during
17 this time period. Based on her experience and her review of thousands of these records over a
18 course of years, Ms. Parker stated her professional opinion that this historical data undeniably
19 established that Ms. Burgard had no life insurance benefits and was receiving flex dollars in lieu
20 of coverage. Data Ms. Parker received from Benefit Solutions, the third-party administrator for the
21 health care saving fund ("HCSF") account for Bank of America retirees including Ms. Burgard,
22 confirm that monthly benefit/flex dollars were being paid into her HCSF.

23 On December 11, 2010, Burgard completed and signed a Beneficiary Designation Form
24 where she indicated that the beneficiary designation applied to all plans she was currently enrolled
25 in, and from a list of benefits, she checked only the AD&D coverage benefit, leaving the Retiree
26 Life Insurance un-marked. In 2011, at the end of the year, Ms. Burgard completed her 2012 Annual
27 Enrollment Worksheet. The Worksheet specifically stated that if she did not make any changes to
28 her benefit enrollment then she would continue to maintain the benefits she had in 2011 which

1 included medical dental, AD&D, and a Health Care Savings Fund, where she was receiving a
 2 monthly credit of \$314.66. On August 27, 2012 (after Burgard's death in April of that year), and
 3 after the AD&D benefit was paid on July 27, 2012, Plaintiff received a letter on BANA letterhead
 4 from a "Jasmine." The letter stated that "Marilyn is covered under the Retiree Life Insurance Plan"
 5 (ECF No. 50 at 12) (ECF No. 70 at pdf p. 152). The letter designates Jasmine as Bank of America
 6 Global Human Resources Service Center Survivor Support Specialist. The letter includes a
 7 "summary of benefits section" with a subsection "Retiree Life Insurance Plan." That subsection
 8 does not describe the plan but merely states that she is covered under a "Retiree Life Insurance
 9 Plan" and that no beneficiary is on file for the plan. There is also a subsection "Retirement
 10 Benefits" that references 401(k)s. On April 26, 2012, Plaintiff received a letter that states that he
 11 is the named beneficiary for a "Retiree Life Insurance Plan" and that "the estimated life insurance
 12 amount is \$10,000." The letter mirrors the letter sent by "Jasmine" and does not clearly describe
 13 what the life insurance plan is, or if it distinct from the undisputed and paid accidental death
 14 coverage.

15 **B. The Terms of Burgard's Purported Plan at the Time of Death**

16 The Bank of America Retiree Health and Insurance Summary Plan Description 2011
 17 (SPD), which went into effect July 1, 2011, and was in effect at the time of Ms. Burgard's death
 18 in April 2012, summarizes the Plan's terms. The SPD states that the Plan, "applies to retirees,
 19 including retirees from certain predecessor companies." The SPD lists "ERISA-covered retiree
 20 component plans," which include the following types of benefits: medical, health care accounts,
 21 dental, vision, and life insurance." The SPD states that its provisions, "are not guaranteed; they are
 22 subject to change at any time without notice and are subject to Bank of America's discretion in
 23 their application." The SPD further provides that Bank of America, "has the exclusive right to
 24 amend, suspend or terminate any benefit plan or any other program or policy described in this
 25 summary." It further provides that BANA has discretion in its application and interpretation of
 26 provisions.

27 As part of the Plan, "Bank of America offers group term life insurance to certain retirees."
 28 The Plan was designed, drafted, and prepared exclusively for Bank of America, and went into

1 effect on January 1, 2009. The SPD contains two booklets that describe the life insurance coverage
2 available for retirees of Security Pacific: Booklet 3 as to supplemental accidental death and
3 personal loss insurance; and Booklet 5 as to supplemental life insurance. Depending on the type
4 of life insurance benefit for which the participant is eligible, contributions (i.e., premiums) are paid
5 by Bank of America and/or the retiree participant. "Security Pacific retirees who retired before
6 Jan. 1, 1991 and had attained age 55 with at least 5 years of benefit service as of Dec. 31, 1992 or
7 had attained age 60 with at least 1 year of service as of Dec, 31, 1992 receive a bank subsidy that
8 is adjusted based on the current cost of a specific grandfathered plan that was offered to Security
9 Pacific employees." Booklet 3 of the SPD provides that Bank of America is the source of
10 contributions (i.e., pays the premiums) for this accidental death and personal loss insurance.
11 Booklet 5 of the SPD provides that the participant retiree is the source of contributions for this
12 supplemental life insurance.

13 "The Plan Administrator is the Bank of America Corporation Corporate Benefits
14 Committee, which is appointed by the Compensation and Benefits Committee of the Board of
15 Directors of Bank of America Corporation. As Plan Administrator, the committee is responsible
16 for overall administration of the Group Benefits Program and each retiree component plan."
17 Among other duties as Plan Administrator, Bank of America is responsible for complying with the
18 ERISA reporting rules and regulations. As Policyholder, Bank of America selects the products and
19 benefit levels under the Plan. Booklets 3 and 5 both advise the participants that if they have any
20 questions regarding their Plan, they should contact the Plan Administrator, which is Bank of
21 America

22 The SPD states that it "contains the summary plan descriptions of available benefit plans
23 covered by The "ERISA information" chapter is part of "the summary plan description for the
24 Bank of America Retiree Life Insurance Plan." The "ERISA information" chapter explains that
25 some of the benefits in the SPD are retiree component plans under the Bank of America Group
26 Benefits Program ("Group Benefits Program") and are subject to [ERISA], and that these ERISA
27 plans are identified in the table under "ERISA-covered retiree component plans" at the end of the
28 chapter. "Life Insurance" is identified as one of the ERISA plans in the table. Bank of America is

1 incentivized to offer the life insurance coverages, including the voluntary coverages funded by the
2 participants, as part of a bundled Group Policy by discounted pricing on the premiums it pays for
3 the employer-funded coverages.

4 Defendants have no record of Ms. Burgard having supplemental life insurance coverage
5 through the Plan. Stephanie Skowron, Aetna's Senior Life Claims Analyst affirmed that she was
6 responsible for handling and processing the accidental death and personal loss claim related to Ms.
7 Burgard, but that there was no supplemental life insurance under the Plan on record for Ms.
8 Burgard. On October 23, and November 8, 2012, Skowron responded to correspondence from
9 Kevin Horan explaining the only benefits documented in the database that were related to Ms.
10 Burgard were the accidental death and personal loss benefits that had already been paid out, and
11 there were no additional benefits associated with this claim. The database as it pertains to Ms.
12 Burgard does not document eligibility for the supplemental life insurance coverage described in
13 Booklet 5 which is recorded in the Claim Status Note. The Claim Status Note identifies all benefits,
14 policies, and action related to Ms. Burgard as a participant. For Ms. Burgard, the only coverage
15 the Claim Status Note references is the supplemental accidental and personal loss coverage
16 described in Booklet 3.

17 In addition, Ms. Drake affirms that if Aetna had received confirmation of eligibility for
18 supplemental life insurance coverage from Bank of America and/or its third party administrator,
19 the life claims analyst would have to still confirm that there was coverage in force by checking the
20 in-house retiree listing. Ms. Drake reviewed the retiree list and Ms. Burgard was not listed as an
21 eligible retiree under the supplemental life insurance benefits, but was listed as an eligible retiree
22 for accidental death and personal loss benefits. Ms. Drake further reviewed the records and
23 confirmed that Aetna did not have any records of premiums ever being paid on Ms. Burgard's
24 behalf for a supplemental life insurance policy, which is a retiree contribution policy. Bank of
25 America and its third party administrator, also reported to Ms. Drake in May 2016, that they
26 reviewed their records and found no records of premiums ever being paid on Ms. Burgard's behalf
27 for the supplemental life insurance policy. It is undisputed that on July 27, 2012, Aetna paid
28 Plaintiff a \$10,000 Accidental Death Benefit, plus \$7.86 in interest, and on August 16, 2012, Aetna

1 paid Plaintiff a \$10,000 Seatbelt Benefit, plus \$9.08 in interest. Both benefits were covered under
2 the accidental death and personal loss coverage.

3 4 **VI. DISCUSSION**

5 Defendants argue that any plan inherited from Arizona Bank and Security Pacific, for
6 which they could be liable, would fall within the terms of the SPD, and constitute an ERISA Plan.
7 Defendants further argue that the Safe Harbor provision does not apply and that all state law claims
8 are pre-empted by ERISA. Finally, Defendants contend that they have conclusively shown that if
9 Ms. Burgard ever had a plan, it was waived or abandoned, and therefore Plaintiffs' ERISA claim
10 must fail. Plaintiffs argue that even if the plan was originally an ERISA plan, it could have been
11 converted to an individual plan over time. Plaintiffs further argue that it is undisputed that Plaintiff
12 had a plan upon her retirement, and there remains a dispute as to the "fate" of the plan. For the
13 reasons stated below, the Court concludes that any plan for which Defendants would be liable
14 would be an ERISA plan, to which the Safe Harbor does not apply; that all of the state law claims
15 are preempted; and that there remains a dispute of material fact as to the "fate" of the plan and
16 whether Ms. Burgard was entitled to the benefit upon her death.

17 18 **A. ERISA Pre-Emption**

19 **i. Safe Harbor**

20 ERISA's safe harbor provision provides that benefit plans are not considered employee
21 welfare plans or welfare plans under ERISA when: the employer or employee organization makes
22 no contributions; participation in program is completely voluntary for employees or members; the
23 employer does not endorse the program but merely allows the insurer to publicize the program to
24 employees and collects premiums to remit to the insurer; and when the employer or employee
25 organization does not receive any consideration other than reasonable compensation, excluding
26 any profit, for administrative services actually rendered to collect and remit premiums to the
27 insurer. 29 C.F.R. § 2510.3-1 (j). "An employer has not established an ERISA plan if it merely
28 advertises a group insurance plan that has none of the attributes described in 29 C.F.R. § 2510.3–

1 1(j).” Kanne v. Conn. Gen. Life Ins. Co., 867 F.2d 489, 492 (9th Cir. 1988). To invoke the safe
 2 harbor exemption, all four requirements must be satisfied. Stuart v. UNUM Life Ins. Co. of
 3 America, 217 F.3d 1145, 1153 (9th Cir. 2000).

4 The third element bars application of the safe harbor where the employer “actively
 5 endorses” a plan, encouraging employees to join, or serves as the administrator of the plan. Sarraf
 6 v. Standard Ins. Co., 102 F.3d 991, 993 (9th Cir. 1996). Defendants argue that BANA established
 7 and maintained its Plan, and the Plan documents describe the Plan as an ERISA-governed plan:
 8 “Bank of America acts as more than just a conduit for the life insurance; it endorses the Plan in its
 9 role as Plan Administrator by: preparing and drafting the SPD; determining the benefits to be
 10 provided; describing the Plan as an ERISA-governed Plan; retaining discretion to interpret the Plan
 11 documents and to amend or discontinue the Plan; providing information to the Plan participants in
 12 relation to the Plan; and its duty to comply with ERISA’s reporting requirements.”

13 The Court finds that the original Arizona plan was eventually acquired by BANA. It was
 14 thus a supplemental life insurance plan as described in Booklet 5 of the SPD, placing it within a
 15 plan administered by BANA, over which BANA has declared its control and ability to amend and
 16 rescind, as well as its intention for ERISA to apply. BANA has represented that it does not
 17 administer or have any involvement in any individual plans of any other kind regarding life
 18 insurance. Moreover, even if the Plaintiff’s original Arizona plan coverage was somehow
 19 converted to an individual plan or a different provider, BANA and AETNA have no record of the
 20 plan and would then not be proper defendants for the state law claims, or an ERISA claim.
 21 Defendant does not contest that the SPD refers to the relevant life insurance plan, and place it
 22 within the Retiree Life Insurance Plan framework. The Court finds that framework makes clear
 23 administration by BANA, and therefore endorsement that bars application of the safe harbor to
 24 Plaintiff’s claims.

25 **ii. ERISA Plan**

26 A defendant bears the burden of proving the necessary facts to establish ERISA preemption
 27 as a defense. Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 492 (9th Cir. 1988). Whether
 28 an ERISA plan existed is a question of fact “to be answered in the light of all the surrounding

circumstances from the point of view of a reasonable person.” Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118, 1120 (9th Cir. 1998). In reviewing the surrounding circumstances, a judge may consider documents not physically attached to the complaint if the “authenticity ... is not contested” and “the plaintiff’s complaint necessarily relies” on them. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (overruled on other grounds). An ERISA plan is: (1) A plan, fund or program, (2) established or maintained by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, or unemployment benefits to the participants or their beneficiaries. 29 U.S.C. § 1002(1).

An employer cannot establish a plan by merely deciding to extend benefits; A plan is established when the benefits are offered under an organized scheme and the terms allow a reasonable person to determine the basic elements of the scheme. Winterrowd v. Am. Gen. Annuity Ins. Co., 321 F.3d 933, 939 (9th Cir. 2003). Very few offers to extend benefits fail to establish a plan. Id. A participant is an employee or former employee that is or may become eligible for benefits under the employer’s benefit plan or whose beneficiaries may be eligible to receive any such benefits. 29 U.S.C. § 1002 (2)(B)(7).

ERISA preempts state laws under two provisions: 29 U.S.C § 1144(a) and 29 U.S.C. § 1132(a). Cleghorn v. Blue Shield of California, 408 F.3d 1222, 1225 (9th Cir. 2005).

Conflict preemption occurs under 29 U.S.C. 1132(a)—commonly known as §502(a). Fossen v. Blue Cross and Blue Shield of Montana, Inc., 660 F.3d 1102, 1107 (9th Cir. 2011). Conflict preemption under §502(a) completely preempts state-law claims within the scope of ERISA’s civil enforcement provisions. Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004). State-law claims are completely preempted if: (a) an individual could have brought the claim under ERISA §502(a) at some point in time, and, (b) there is no other independent legal duty that is implicated by the defendants’ actions. Davila, 542 U.S. at 210. Section 502 allows claims to be brought when the participant or beneficiary seeks to: (a) recover benefits due under the ERISA plan, (b) enforce rights under the ERISA plan, or (c) clarify rights to future benefits under the ERISA plan. 29 U.S.C. § 1132(a)(1)(B). Section 502 also allows claims to be brought when the

1 participant or beneficiary seeks relief from an ERISA plan fiduciary who breached any
2 responsibilities, obligations, or duties imposed upon fiduciaries. 29 U.S.C. § 1109.

3 Express preemption occurs under 29 U.S.C. 1144(a)—commonly known as Section 514(a).
4 Fossen, 550 F.3d at 1107. Preemption under Section 514 is broad in scope and deliberately
5 expansive. Pilot Life Ins. Co. v. Dedeux, 481 U.S. 41, 46 (1987). Section 514 expressly preempts
6 any state laws that relate to employee benefit plans. Id. at 45 (1987). “Relate to” is defined broadly
7 with a common-sense meaning; “a state law ‘relates to’ a benefit plan ‘if it has a connection with
8 or reference to such a plan.’” Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732
9 (1985). ERISA may preempt a state law if it relates to an employee benefit plan even if the law is
10 not specifically designed to affect such plans or the effect is only indirect. Bast v. Prudential Ins.
11 Co. of Am., 150 F.3d 1003, 1007 (9th Cir. 1998). A state law “relates to” an ERISA plan if it has
12 a connection with or reference to such a plan. California Div. of Labor Standards Enforcement v.
13 Dillingham Const., N.A., Inc., 519 U.S. 316, 324 (1997).

14 Courts use a “relationship test” to determine whether a claim has a ‘connection with’ an
15 employee benefit plan; “this test emphasizes ‘the genuine impact that the action has on a
16 relationship governed by ERISA, such as the relationship between the plan and the participant.’”
17 Providence Health Plan v. McDowell, 385 F.3d 1168, 1171-72 (9th Cir. 2004). “Connection to” is
18 determined by analyzing the following factors: (a) whether the state law regulates the types of
19 benefits of ERISA employee welfare plans, (b) whether the state law requires the establishment of
20 a separate employee benefit plan to comply with the law; (c) whether the state law imposes
21 reporting, disclosure, funding, or vesting requirements for ERISA plans; and (d) whether the state
22 law regulates certain ERISA relationships, including the relationships between an ERISA plan and
23 employer and, to the extent an employee benefit plan is involved, between the employer and
24 employee. Operating Engineers Health & Welfare Trust Fund v. JWW Contracting Co., 135 F.3d
25 671 (9th Cir. 1998). A state law “references an ERISA plan when it ‘acts immediately and
26 exclusively upon ERISA plans’ or ‘where the existence of ERISA plans is essential to the law’s
27 operation.’” California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 519
28 U.S. 316, 323 (1997).

1 However, ERISA’s saving clause may exempt state laws from §514 preemption. 29 U.S.C.
2 § 1144. The savings clause provides that ERISA must not be construed to exempt or relieve any
3 person from any state law that regulates insurance, banking, or securities. 29 U.S.C. § 1144
4 (b)(2)(A). Employee benefit plans and trusts established under such plans cannot be deemed to be
5 an insurance company or in the business of insurance. 29 U.S.C. § 1144(b)(2)(B). This is known
6 as the deemer clause, which regulates state laws that ‘purport to regulate insurance.’ See Pilot Life
7 Ins. Co. 481 U.S. at 45. It prevents exemption from preemption. But a plan established primarily
8 for the purpose of providing death benefits may be deemed an insurance company or part of the
9 insurance industry. 29 U.S.C. § 1144 (b)(2)(B).

10 A state law regulates insurance under the savings clause if: the state law is specifically
11 directed toward the insurance industry; and, the state law substantially affects the risk pooling
12 arrangement between the insurer and the insured. Kentucky Ass’n of Health Plans, Inc. v. Miller,
13 538 U.S. 329, 342 (2003). State laws of general application that have some bearing on insurers do
14 not fall under the savings clause exemption. Kentucky Ass’n of Health Plans, Inc. v. Miller, 538
15 U.S. 329, 334 (2003).

16 Plaintiff does not address arguments to the specific question of whether or not the life
17 insurance coverage falls within an ERISA plan. Defendants argue that the SPDs lay out the death
18 benefits provided, and place them within a framework clearly maintained and administered by
19 BANA. A plan is maintained where an employer administers the plan. Sarrf v. Standard Ins. Co.,
20 102 F.3d 991, 993 (“As the plan administrator, OCEA also maintained the plan.”) “Nonetheless,
21 we concluded that the plan was an employee welfare benefit plan subject to ERISA because the
22 employer, as the plan administrator, endorsed the group insurance plan within the meaning of the
23 third requirement of the safe harbor regulation. We stated that because the employer is more than
24 a mere advertiser of group insurance, there need not be employer contributions or automatic
25 employee coverage to bring the plan within ERISA.” Stuart v. UNUM Life Ins. Co. of America,
26 217 F.3d 1145, 1150 (9th Cir. 2000). Having determined that the Plan is not exempt under the safe
27 harbor because it is administered and therefore endorsed by the employer, the Plan also satisfies
28 the “maintained” requirement to fall within the ERISA definition of a covered plan.

1 **iii. Breach of Contract Claim**

2 As the Court found at the hearing on the Motion to Dismiss, if the plan is an ERISA plan,
 3 this claim is preempted. The Court now finds the Plan to be an ERISA plan. The Court
 4 incorporates by reference its findings as to that Motion, and elaborates. This claim falls within
 5 section 502(a) because section 502(a) allows Horan to seek recovery for benefits due under the
 6 ERISA plan and enforce the rights established under the ERISA plan. Aetna and Bank of
 7 America's duty to provide the benefits stems solely from the ERISA plan, rather than an
 8 independent legal duty. Moreover, it is well established that breach of contract claims—whether
 9 contractual or tortious—fall within section 502(a). *See Aetna v. Davila*, 542 U.S. at 215. This
 10 claims is thus preempted.

11 **iv. Breach of Implied Covenant**

12 Plaintiffs argue that an implied covenant and duty of good faith exists in every insurance
 13 contract in Nevada, and that Aetna and Bank of America breached this duty by failing to respond
 14 to the Horan's twelve requests. Section 502 allows Plaintiffs to bring a claim to clarify the rights
 15 under the Plan and recover the benefits due to Burgard's estate under the Plan. Horan's twelve
 16 correspondences sought to do exactly that. Moreover, this claim is also dependent upon the legal
 17 duties established by the ERISA plan. Therefore, this claim is also preempted by section 502(a).

18 **v. Violations of Nevada Unfair Practices Act (NRS 686A.310)**

19 Plaintiffs allege Aetna and Bank of America violated NRS 686A.310 by failing to provide
 20 benefits upon Ms. Burgard's death and failing to respond to Horan's communications. They also
 21 argue that the claim is exempt from ERISA preemption under the savings clause.

22 The Nevada Supreme Court has already analyzed the relationship between Nevada's Unfair
 23 Practice Act and ERISA. According to the Nevada Supreme Court's interpretation of the state law,
 24 the claim is preempted under section 514. In *Villescas v. CNA Ins. Companies*, the Nevada
 25 Supreme Court held that claims under Nevada's Unfair Practices Act conflict with ERISA and are
 26 preempted when applied to a valid ERISA plan. 864 P.2d 288, 294 (Nev. 1993). The court held
 27 the provisions of NRS 686A.310 do not pool or average policyholder's risks; the provisions instead
 28 "force the insurer to bear the legal risks associated with certain unfair insurance practices, such as

misrepresentation.” *Id.* at 1082. Accordingly, the state law does not substantially affect the risk pooling arrangement between the insurer and insured. Therefore, the savings clause does not exempt the claim from ERISA preemption.

Therefore, the Court finds that if there is a plan under which these Defendants could be liable, the plan is an ERISA plan, and all of the state law claims are preempted. There remains only the claim for an ERISA violation.

B. The ERISA claim

Plaintiff’s fourth claim for relief asserts a violation of ERISA “pursuant to 29 USC § 1132 and § 502(a).”

ERISA section 502(a) allows a Plaintiff to seek recovery for benefits due under the ERISA plan and enforce the rights established under the ERISA plan. “Extracontractual, compensatory and punitive damages are not available under ERISA.” *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003, 1009 (9th Cir. 1998). “As concluded by other circuit courts which have addressed the question, when the court reviews a plan administrator’s decision under the de novo standard of review, the burden of proof is placed on the claimant.” *Muniz v. Amec Const. Management Inc.*, 623 F.3d 1290, 1294 (9th Cir. 2010) (citing cases finding that plaintiff bears burden of establishing entitlement to contractual benefits under 29 USC 1132(a)(1)(B))

“In actions challenging denials of benefits based on interpretations pursuant to section 1132(a)(1)(B), the district court reviews de novo, “unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.” *Mongeluzo v. Baxter Travenol Long Term Disability Ben. Plan*, 46 F.3d 938, 942 (9th Cir. 1995). In *Mongeluzo*, the Ninth Circuit held that when conducting de novo review of a benefits decision, “new evidence [beyond the administrative record] may be considered under certain circumstances to enable the full exercise of informed and independent judgment.” *Id.* at 943-44. The Court found that additional evidence as to whether an alleged disability fell within a narrow definition of “mental illness” established by a prior decision should be permitted under that standard. *Id.* at 944.

1 Under the undisputed facts, Plaintiff has raised a dispute of fact as to the ERISA claim,
2 even under an abuse of discretion standard. It is undisputed that Ms. Burgard had a life insurance
3 plan; that the type of life insurance plan she had could have been carried over through the mergers
4 and provided a benefit upon her death, and that Defendants have no records as to coverage or lack
5 thereof from 1992 through 2001. While Defendants have presented a plausible explanation for the
6 lack of records, they have not definitively demonstrated that Burgard waived or abandoned her life
7 insurance benefit, and there is no direct evidence of any waiver or abandonment. Therefore, the
8 Court will deny summary judgment as to the ERISA claim. This denial is not a final ruling on “a
9 bench trial on the record.” See Thomas v. Oregon Fruit Products Co., 228 F.3d 991, 996 (9th Cir.
10 2000).

11 Recognizing the unusual nature of this case, the Court has requested supplementary
12 briefing as the standard of review, the scope of evidence it may consider, the type of trial available,
13 and the possibility of amendment. The Court need not yet decide these issues in this Order.

14
15 **VII. MOTION TO RECONSIDER. ECF No. 53.**

16 On August 4, 2016, Defendants filed a Motion for a Protective order. ECF No. 39. The
17 Motion sought to limit deposition testimony of various individuals allegedly possessing
18 knowledge as to Burgard’s life insurance policy. On September 9, 2016, Judge Foley granted the
19 motion in part and denied in part He determined that “Defendants’ motion for summary judgment
20 appears to make a strong case that the “safe harbor” exception does not apply; that Plaintiff’s claim
21 for life insurance benefits is governed by ERISA and that the state law claims are preempted.”
22 Relying in part on the determination that ERISA likely governed, and caselaw on the need to
23 balance the goals of ERISA, including maintaining premium costs at a reasonable level, with the
24 goals of obtaining justice in litigation in setting the scope of discovery (ECF No. 50 at 7-8), he
25 ordered one 30(b)(6) deposition of a representative of BANA who “should be prepared to testify
26 about relevant information or documents in the possession of both BANA and Aetna.” The
27 testimony was to cover (1) “the fate of the life insurance policy provided to Ms. Burgard at the
28 time of her retirement in 1986, (2) what records may exist pertaining to cancellation of life

1 insurance policies provided to retired employees by predecessor employers or plans; (3) the
2 process by which retired employees were able to convert to life insurance policies in which they
3 pay premiums; and (4) what records may still exist regarding the termination of Burgard's plan
4 and if she was afforded an opportunity to continue life insurance coverage."

5 Plaintiff objects to the limitations in deposition testimony, specifically that it was not
6 permitted to depose certain individuals. First, Plaintiff sought to depose Stephanie Skowron, the
7 Aetna Senior Life Claims analyst whose declarations states that she was responsible for the
8 handling of Burgard's Accidental Death (AD) and Personal Loss (PL) claim and reviewed her
9 administrative record. Her declaration states that "at no time did the system identify life insurance
10 benefits for Marilyn Burgard, and I am not aware for any documentation from Aetna or Bank of
11 America recording that Marilyn Burgard had life insurance under the terms of the Plan." Plaintiff
12 also sought and seeks to depose "Jasmine," the author of an August 27, 2012 letter, on Bank of
13 America letterhead, stating that "Marilyn is covered under the Retiree Life Insurance Plan."
14 Defendants in their Reply to the MSJ argue that she was referring generally to the portion of the
15 Plan that included the undisputed accidental death coverage. Plaintiff contends that Defendants
16 can't rely on this declaration to claim there is no life insurance policy while avoiding deposition.
17 Third Plaintiff sought to depose a 30(b)(6) representative of Aetna. Plaintiff states that Defendants
18 mailed a disk with 400 pages of previously undisclosed documents to Plaintiff on August 18,
19 received August 22, a day before the close of discovery.

20 Plaintiff posits the following errors in Judge Foley's reasoning: (1) The Magistrate
21 erroneously considered facts and arguments in ECF 47 MSJ even though the Response had not yet
22 been filed. (2) The order failed to acknowledge the Plaintiff's attempted communications with
23 defendants regarding the depositions. (3) The magistrate erroneously determined that ERISA
24 likely applied and therefore erroneously applied ERISA standards to discovery. (4) The magistrate
25 erroneously denied the above-listed depositions. Plaintiff argues that the depositions are
26 proportional to the needs of the case, and should have been and should be permitted.

27 Plaintiff argues that defendants' initial disclosures failed to list any witnesses and that
28 providing 400 pages of discovery and witness disclosure just before the deadline prejudiced

1 Plaintiff. Defendants argue that judge Foley properly considered the standard, including discovery
2 limitations in ERISA cases, and properly limited discovery to the one 30(b)(6) rep of BANA, the
3 plan administrator, which he determined would be in a better position to identify records, “if any
4 exist, regarding the fate of the life insurance policy issued to Burgard at the time of her retirement.”
5 Defendant argues that its disclosures were within the order deadlines, and that it has not disclosed
6 any documents regarding the original life insurance policy because the policy was likely
7 terminated by Ms. Burgard and converted to an individual policy prior to BANA’s acquisition of
8 Security Pacific. Therefore, neither defendant would have the original policy in its records. At the
9 hearing on March 17, 2017, the Defendants identified “Jasmine” as an employee of AON Hewett,
10 one of the former insurance claims administrators for Bank of America.

11 The Court finds that Judge Foley did not err in the limiting the discovery. His order
12 properly limited discovery in light of the likelihood that ERISA applied, while not unduly
13 preventing Plaintiff from seeking information that might establish the safe harbor or otherwise
14 counter the ERISA arguments, and that might elucidate the “fate” of any insurance plan for which
15 defendants would be liable.

16 The Aetna handler at the time of Ms. Burgard’s death, Ms. Skowron, stated in her
17 declaration that “at no time did the system identify life insurance benefits for Marilyn Burgard,
18 and I am not aware for any documentation from Aetna or Bank of America recording that Marilyn
19 Burgard had life insurance under the terms of the Plan.” Based on this statement and on his finding
20 that BANA, as the plan administrator, would have any documents or knowledge of the original
21 plan and the transfer of plans after the acquisitions, Judge Foley properly limited the testimony to
22 the BANA 30(b)(6) representative, who ultimately did provide testimony as to the original
23 coverage and how it subsequently changed after the acquisitions.

24 It is undisputed that Aetna did not become the claims administrator until January 1, 2009,
25 that Defendants have records for Ms. Burgard beginning in 2001, and that those records never
26 indicate coverage for the disputed life insurance. Plaintiff has not persuasively argued that
27 deposing Skowron or another Aetna representative, or “Jasmine,” who worked for a third-party
28 that contracted with Bank of America, and would not have superior access to information regarding

1 any plan, would provide needed information as to either ERISA preemption or the “fate” of the
2 disputed policy since Ms. Burgard’s retirement. Therefore, the Motion to Reconsider, ECF No. 53,
3 is DENIED.

4
5 **VIII. CONCLUSION**

6 Accordingly,

7 **IT IS HEREBY ORDERED** that ECF No. 47 Motion for Summary Judgment is granted
8 in part and denied in part. The state law claims are dismissed as pre-empted by ERISA. Count IV
9 for violation of ERISA may proceed.

10 **IT IS FURTHER ORDERED** that a hearing on ECF Nos. 84 and 85 Supplemental Briefs
11 is set for Thursday, April 20, 2017 at 10:00 AM in LV Courtroom 7D.

12 **IT IS FURTHER ORDERED** that ECF No. 62 Motion for Leave to File Supplement is
13 GRANTED.

14 **IT IS FURTHER ORDERED** that ECF No. 53 Motion to Reconsider is DENIED.

15
16 **DATED:** March 31, 2017.



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18 **RICHARD F. BOULWARE, II**
19 **UNITED STATES DISTRICT JUDGE**
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